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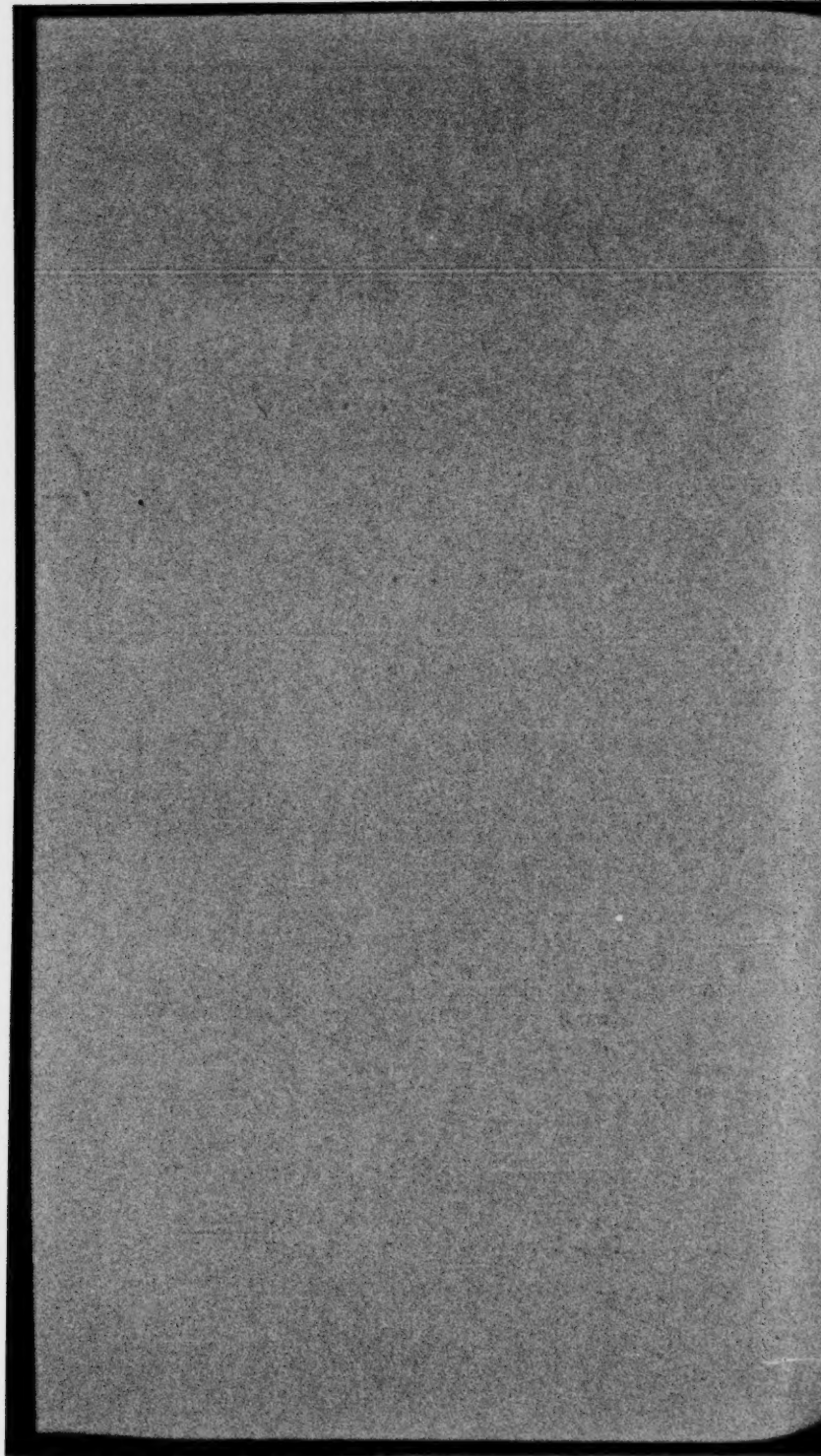
IN THE
Supreme Court of the United States.
October Term, 1924 1925

GEORGE WILLIAM MOTTRAM, *Appellant*, }
v. } No. 14
THE UNITED STATES.

MOTION OF APPELLANT TO REMAND TO
COURT OF CLAIMS FOR AMENDMENT OF
FINDINGS OF FACT.

JENNINGS C. WISE,
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Of Counsel.



IN THE
Supreme Court of the United States

October Term, 1924.

GEORGE WILLIAM MOTTRAM, *Appellant*, }
v. } No. 545.
THE UNITED STATES.

MOTION OF APPELLANT TO REMAND TO
COURT OF CLAIMS FOR CORRECTION OF
FINDINGS OF FACT.

The appellant by his attorney shows the Court the following facts:

1. Paragraph VII of the Findings of Fact of the Court of Claims in the case is as follows:

“The plaintiff before the sale on June 25, 1919, had made repeated visits to the United States Engineers’ depot at Slough, England, and had full opportunity to acquaint himself with the character and quantity of the supplies which were to be sold at the auction sale. At his request the Garlock steam packing was pointed out to him by one of the employees of the depot on the day before the sale. The Garlock steam packing was all housed together in a part of one warehouse, and it was shown to the plaintiff, and he was given full opportunity to arrive approximately at its quantity. He then had the catalogue which listed for sale 278,432 pounds of Garlock steam packing. It would have required 560 cases to hold that amount of packing, and it would have required 15,000 cubic feet of space to house it. Such a quantity would have

supplied the needs of Great Britain for Garlock packing for twenty years. On many occasions the plaintiff, prior to June 24, 1919, was at the depot, and was given every facility to inspect the goods and supplies which were stored there and which were afterwards sold at the auction sale aforesaid."

2. This case was decided by the Court of Claims March 3, 1924. April 7, 1924, appellant, by leave of the Court, filed a motion, hereinafter set out as Exhibit A, with brief that the Court's decision, dismissing the petition, be set aside, among other reasons, for the reason that the Court erred in finding as a matter of fact that at the request of the appellant the Garlock steam packing which was to be sold on June 25, 1919, was pointed out to him by one of the employees of the depot at Slough, England, on the day before the sale; that the appellant had full opportunity to acquaint himself prior to the sale of June 25, 1919, with the quantity of Garlock packing that was actually on hand at the U. S. Engineers' Depot at Slough, England; and that 278,432 pounds of Garlock steam packing was a quantity which would have supplied the needs of Great Britain for such packing for twenty years.

3. The said motion for a new trial was, in accordance with Rule 90 of the Court of Claims, the appropriate procedure for appellant to seek to have the findings of fact amended to accord with the evidence.

4. The finding of fact that at his request the Garlock steam packing was pointed out to the appellant by one of the employees of the depot on the day before the sale is contrary to the evidence inasmuch as there was evidence that the appellant did not visit the depot subsequent to June 4, 1919, until June 25, 1919, and no evidence that he did.

5. There was no evidence before the Court that 278,-432 pounds of Garlock steam packing would have supplied the needs of Great Britain for Garlock packing for twenty years.

6. April 14, 1924, the Court of Claims entered an order overruling the said motion.

7. Appellant deems the fact that the packing was *not* pointed out to him by one of the employees of the depot on the day before the sale, and that he was *not* at the depot subsequent to June 4, until June 25, 1919, facts that are material evidence on the question as to whether or not he had knowledge of the quantity of packing at the depot on June 25, 1919, or the day of the sale, and moves this Court remand the case to the Court of Claims with directions that it so amend its findings of fact as set out in Paragraph VII as to make its findings of fact accord with the evidence.

JENNINGS C. WISE,
Attorney for Appellant.

DISTRICT OF COLUMBIA, ss.:

Before me this day appeared Jennings C. Wise, whose name is signed as attorney to the foregoing motion, and made oath that all of the statements contained in said motion are true.

Subscribed and sworn to before me this 15th day of September, 1924

HARRY N. STULL,
Notary Public.

[SEAL]

EXHIBIT A.

IN THE COURT OF CLAIMS.

GEORGE WILLIAM MOTTRAM }
v. } No. B-52.
THE UNITED STATES. }

MOTION FOR NEW TRIAL.

The claimant moves that the Court's decision of March 3, 1924, dismissing the petition, be set aside for the following reasons:

1. The Court errs in finding as a matter of fact that at the request of the plaintiff the Garlock steam packing which was to be sold on June 25, 1919, was pointed out to him by one of the employees of the depot at Slough, England, on the day before the sale. (Para. 7, Findings of Fact.)

2. The Court errs in finding as a matter of fact that the plaintiff had full opportunity to acquaint himself prior to the sale of June 25, 1919, with the quantity of Garlock packing that was actually on hand at the U. S. Engineers' Depot at Slough, England. (Para. 7, Findings of Fact.)

3. The Court errs in finding as a matter of fact that 278,432 pounds of Garlock steam packing was a quantity which would have supplied the needs of Great Britain for such packing for twenty years. (Para. 7, Findings of Fact.)

4. The Court errs in failing to find as a matter of fact that the auctioneer stated at the sale of June 25, 1919, that the material being offered by him for sale

might be at the depot at Slough, England, and that it might be on the way or elsewhere.

5. The Court errs in failing to find as a matter of fact that when J. G. White & Co., Ltd., accepted the check of the plaintiff in payment for 278,432 pounds of Garlock steam packing the defendant knew that there was no such quantity of Garlock steam packing at the U. S. Engineers' Depot at Slough, England, and that lots 1268 to 1277 as listed in the catalogue contained 2,784.32 pounds and not 278,432 pounds of Garlock steam packing.

6. The Court errs in deciding as a matter of law that the defendant is not liable upon the contract of sale entered into between the defendant and the plaintiff on June 25, 1919, whereby there was sold to the plaintiff by the defendant 278,432 pounds of Garlock steam packing.

7. The Court errs as a matter of law in entering judgment against the plaintiff for the cost of printing the record herein.

A true copy.

Attest this 15th day of September, 1924.

HARRY N. STULL,

[SEAL]

Notary Public.

BRIEF.

The materiality of the errors which the Court of Claims made in its findings of fact as set out in Para. VII, is apparent from the following language which appears in its decision:

"The plaintiff having knowledge that the quantity of packing which he bid for was not in the possession of the vendor, and knowing when he

bid and when he paid for the packing that it could not be delivered, he can not be heard in this Court to assert a claim so evidently based upon a design to get something for nothing."

Thus, it is seen that erring as to the facts the Court of Claims imputed to appellant a knowledge that it deemed fatal to his claim. An analysis of the evidence, however, will show that the findings of fact set out in Para. VII are not in accordance with the evidence.

I.

THE GARLOCK STEAM PACKING WAS NOT POINTED OUT TO THE PLAINTIFF BY AN EMPLOYEE OF THE DEPOT THE DAY BEFORE THE SALE.

It is not denied by the appellant that he visited the U. S. Engineers' Depot at Slough, England, frequently prior to the sale of June 25, 1919. The evidence shows that in March, 1919, he purchased a lot of wheelbarrows at private sale from a firm which had bought them from the United States and that for some time he was engaged in and about the depot removing the wheelbarrows. (R. p. 75, Q. & A. 35-37; p. 111, Q. & A. 84; p. 37, Q. & A. 97, et seq.) But appellant testified that he did not visit the depot between June 4 and June 25, 1919. (R. p. 73, Q. & A. 3-4; p. 74, Q. & A. 17-19.) And the testimony of appellant to this effect is uncontradicted.

The witness, David A. Hart, who was in command of the depot from October, 1918, to August, 1919, testified that on numerous occasions appellant visited the depot for the purpose of inspecting materials and that he did inspect them. (R. p. 272, Q. & A. 24-27.) That

he, Hart, designated Fred Mellett, the chief storekeeper at the depot, to escort appellant through the depot. (R. p. 272, Q. & A. 27.) That he saw appellant inspecting asbestos sheets and wheelbarrows. (R. p. 275, Q. & A. 43-50.) But this witness did not testify that he saw appellant at the depot subsequent to June 4, 1919, and was unable to say that the plaintiff visited the depot at any time during the month preceding June 25, 1919. (R. p. 276, Q. & A. 53.)

The witness, Fred Mellett, who was referred to by the witness Hart, testified that appellant visited the depot prior to June 25, 1919, and definitely fixed the date of the appellant's visit which he recalled as prior to March 29, 1919. (R. p. 218, Q. & A. 21-32; p. 262, Q. & A. 12.)

It is seen, therefore, that the testimony of the witnesses Hart and Mellett when considered together, confirms the testimony of appellant.

The witness, Isaac Grizard, testified that he saw the appellant at the depot prior to the sale of June 25, 1919, on several occasions. (R. p. 170, Q. & A. 103, et seq.) And while this witness at first stated that he thought he saw appellant at the depot on the day before the sale, when cross-examined he was unable to say that he had seen the appellant at the depot within thirty days of the sale. (R. p. 170, Q. & A. 115, et seq.)

The only evidence whatever that appellant visited the depot in the month of June is the testimony of the witness, George Thomas Spackman, who was in charge of the warehouses at the depot, but even this witness did not testify that appellant visited the depot between June 4 and June 25, 1919. (R. p. 158, Q. & A. 30.)

If, therefore, there is no evidence that appellant visited the depot between June 4 and June 25, 1919, and there is uncontradicted evidence that he did not

visit the depot during that time, it was error for the Court to find that the Garlock steam packing at the depot was pointed out to appellant by an employee of the depot on June 24, 1919, or the day before the sale.

II.

APPELLANT DID NOT HAVE FULL OPPORTUNITY TO ACQUAINT HIMSELF PRIOR TO THE SALE OF JUNE 25, 1919, WITH THE QUANTITY OF GARLOCK STEAM PACKING ACTUALLY ON HAND AT THE DEPOT ON JUNE 25, 1919.

Appellant testified that on the occasion when he visited the depot it was customary for him to inspect those articles which were open for inspection. (R. p. 37, Q. & A. 89, et seq.; p. 54, Q. & A. 331.) But that there was very little to be seen. (R. p. 38, Q. & A. 101; Q. & A. 114.) And that he made no inquiries about Garlock packing for the reason that prior to the sale he had no intention of buying Garlock packing. (R. p. 38, Q. & A. 117, et seq.) And that no one pointed out to him prior to June 25, 1919, that Garlock packing was to be sold. (R. p. 39, Q. & A. 123.)

The witness, Spackman, who was in charge of the warehouses at the depot, testified that the appellant did inquire of him prior to the sale of June 25, 1919, about Garlock packing among other things. (R. p. 158, Q. & A. 31, et seq.; p. 161, Q. & A. 91, et seq.) And that he pointed out the packing to the appellant; (R. p. 158, Q. & A. 37-39), along with wheelbarrows or anything else appellant asked to see. (R. p. 161, Q. & A. 91, 92.) This witness also testified that appellant had a catalogue which he ticked off as he examined the articles shown to him. (R. p. 158, Q. & A. 31.)

That appellant entered into no discussion about the Garlock packing (R. p. 162, Q. & A. 97); but only asked where the packing was located (R. p. 159, Q. & A. 500), and when shown the packing made no examination of it (R. p. 159, Q. & A. 51), and this witness merely assumed as shown by his testimony, that appellant ticked his catalogue when the Garlock packing was shown to him because he ticked his catalogue when other articles were shown to him. (R. p. 162, Q. & A. 99-100.) It has already been shown that this witness did not testify that he showed the packing to appellant after June 4, 1919.

The witness, Fred Mellett, testified that on one occasion prior to March 29, 1919, appellant inquired of him about packing. (R. p. 218, Q. & A. 21; p. 219, Q. & A. 32.) That he showed the packing to appellant (Ibid), but that he was doubtful if at the time he showed it to him the lots described in the catalogue printed in connection with the sale of June 25, 1919, were listed. (R. p. 218, Q. & A. 22.)

It has been shown that the evidence is that appellant did not visit the depot between June 4 and June 25, 1919, and the evidence is clear that the catalogue relating to the sale of June 25, 1919, was not published prior to June 4, 1919. It is apparent, therefore, that if on the occasion recalled by the witness Spackman, appellant had a catalogue which he ticked as he examined the articles shown to him, it could not have been the catalogue printed in connection with the sale of June 25, 1919, in which the lots of Garlock steam packing were listed.

But even if it be taken as a fact established by the testimony of the witnesses, Spackman and Mellett, that the appellant did inquire about Garlock steam packing prior to June 25, 1919, and before the sale was endeavor-

oring to determine the quantity on hand at the depot, there is nothing in the evidence to show that he had any reasonable ground to believe that the quantity offered for sale on June 25, 1919, was not on hand on that date. On the contrary, there is evidence tending to show that any inspection which appellant may have made prior to June 4, 1919, could not have satisfied a prospective purchaser that the material then on hand was all that would be on hand at a subsequent date. For instance, the witness, Spackman, himself testified that material was still arriving at the depot during the week prior to June 25, 1919 (R. p. 157, Q. & A. 23), and the witness, Donald A. Smith, the officer of the United States in charge of the sales at the depot, testified that the quantities of material at the depot were constantly changing due to the fact that train loads of material were arriving daily. (R. p. 108, Q. & A. 46.) Under these circumstances it was clearly impossible for any one by an inspection prior to June 4, 1919, to determine with certainty that the material that was offered for sale on June 25, 1919, was not then on hand.

So much as to appellant's knowledge prior to June 25, 1919, or the day of the sale, about the quantity of packing on hand at the depot.

Appellant testified that he arrived at Slough by train shortly before 11 A. M. on the day of the sale; that he walked straight to the salesroom from the station, arriving there three or four minutes before the sale commenced; and that he did not visit the warehouses on the way to the salesroom or during the sale. (R. p. 73, Q. & A. 5-10.)

The witness, Robert H. Ruddock, the auctioneer, testified that the material sold by him on June 25, 1919, was not sold in the warehouse where it could be seen by

the bidders, but was sold by sample in a hut used for a salesroom. (R. p. 131, Q. & A. 80.) That unless a buyer had checked the material upon which he bid by a personal inspection of the same in the warehouses there was no way for the bidder to tell from the catalogue whether or not the quantity offered for sale was actually on hand; but that the material in the warehouses had been subject to inspection for a week. (R. p. 132, Q. & A. 88; p. 136, Q. & A. 103.)

The witnesses, Walter Ernest Burt and B. F. J. Day, also testified that the material had been subject to inspection in the warehouses throughout the week preceding the sale (R. p. 140, Q. & A. 27 et seq.; p. 146, Q. & A. 68 et seq.), but neither of these witnesses testified that appellant visited the warehouses during that time, though the latter recalled visits by him on previous occasions.

Appellant testified that upon arriving at the salesroom he made no attempt to inspect the packing in the warehouses and saw only the samples of the packing which were exhibited by the auctioneer in the salesroom (R. p. 42, Q. & A. 171 et seq.); that he made no inspection of the packing because he had not contemplated prior to the sale buying packing; and that it was the low price at which the packing was being offered at the sale that first attracted his interest in it. (R. p. 42, Q. & A. 178.)

But even if he had attempted to check the quantity of packing in the warehouses after his arrival at the salesroom on the day of the sale, the evidence is to the effect that he would not have been able to do so by reason of the condition which prevailed during the sale. For instance, the witness, Richard Stephen Davies, testified that he attended the sale for the purpose of

bidding on the packing listed in the catalogue; that he arrived at the depot the morning of the sale and made repeated inquiries of the attendants and others as to the location of the packing which he wished to inspect; that he could find no one who could point it out to him; that he looked for it in vain; and that only the samples of the packing which were in the salesroom were shown to him. (R. p. 12, Q. & A. 54 et seq.) From the testimony of this witness it would appear that the determination of the quantity of packing on hand by a bidder on the day of the sale, much less after the sale commenced, was impracticable.

The Court found that the auctioneer himself did not know that the quantity of packing sold by him was not on hand. (Para. 8, Findings of Fact.) It would seem that if there were no reason for the auctioneer to suspect that a mistake had been made in the catalogue with respect to the quantity of packing on hand, notwithstanding the large quantity noted in the catalogue, there was no reason for appellant and other buyers to suspect one. Furthermore, the witness, Davies, testified that the auctioneer when offering various articles for sale stated that the material he was offering might not be at the depot, but might be on the way or elsewhere. (R. p. 14, Q. & A. 87, 97.) In view of the fact that material was still arriving at the depot, as shown by the testimony of the witnesses, Smith and Spackman, the statement of the auctioneer was a most natural one, and could but have had the effect of rendering any knowledge on the part of the bidders as to the quantity of any particular material actually in the warehouses inconclusive with respect to the ability of the vendor to deliver what was sold.

The witness, Isaac Grizard, whose testimony appears

to be unreliable, first testified that appellant told him about half an hour before the sale that he did not believe the quantity of packing being offered by the auctioneer was on hand. (R. p. 167, Q. & A. 51 et seq.; p. 171, Q. & A. 125 et seq.) When cross examined this witness admitted out of his own mouth that appellant made no such statement to him. (R. p. 180, Q. & A. 274-276.)

The testimony of the witness, Day (R. p. 151, Q. & A. 131 et seq.), with respect to what was told to him by one Barnes, being purely hearsay testimony, is inadmissible as evidence and is not to be considered by the Court. The evidence that has been examined, therefore, constitutes all of the evidence as to the knowledge of appellant with respect to the quantity of packing on hand either prior to or on the date of the sale, and it is submitted that it was material error for the Court to infer from this evidence that appellant knew, or to find that he had full opportunity to determine what quantity was actually on hand when he bid on 278,432 pounds of Garlock packing and when that quantity was knocked down to him by the auctioneer.

III.

THE FACT WAS NOT ESTABLISHED IN EVIDENCE THAT 278,432 POUNDS OF GARLOCK STEAM PACKING WOULD HAVE SUPPLIED THE NEEDS OF GREAT BRITAIN FOR SUCH PACKING FOR TWENTY YEARS.

The Court found as a matter of fact that 278,432 pounds of Garlock steam packing would have supplied the needs of Great Britain for such packing for twenty years. (Para. 7, Findings of Fact.)

There was no evidence before the Court competent to establish such a fact.

The only evidence as to the needs of Great Britain for Garlock packing is the testimony of the witness, Donald A. Smith, to the effect that the quantity mentioned was approximately the amount of packing consumed in Great Britain in twenty-five years. (R. p. 120, Q. & A. 172.)

This witness was not qualified as an expert, or as one with an expert knowledge of the needs of Great Britain for Garlock steam packing. At most his statement expressed a mere opinion as to what the consumption of packing had been in Great Britain in the past. The future needs of Great Britain for Garlock steam packing could not, of course, be estimated even by an expert on the basis of past experience. Furthermore, Great Britain was a world market and the consumption of packing in Great Britain had no relation to the quantity that might be exported from Great Britain, and certainly not to the quantity that might be deemed needful by the military authorities of the United States. The testimony of the witness, Richard Attwater, the largest dealer in packing in England, shows that large quantities of packing were exported by him to China and elsewhere outside of Great Britain (R. p. 26, Q. & A. 35, et seq.), and that he had made one sale of 400,000 pounds of packing. (R. p. 132, Q. & A. 92.) And the testimony of Richard Stephen Davies, another dealer in packing, shows that under the circumstances of wartime conditions he did not deem 278,432 pounds of Garlock packing as an unreasonable quantity for the United States Government to have owned. (R. p. 14, Q. & A. 87, et seq.)

IV.

THE AUCTIONEER STATED THAT THE PROPERTY OFFERED FOR SALE MIGHT BE AT THE DEPOT AT SLOUGH OR IT MIGHT BE ON THE WAY OR ELSEWHERE.

The witness, Richard Stephen Davies, testified that the auctioneer stated at the sale that some of the material he was offering might not be in the depot, but might be somewhere else, or on the way. (R. p. 14, Q. & A. 87-89; Q. & A. 97, et seq.)

If the auctioneer made this statement it was a most material as well as a most natural one, in view of the fact that stores were still arriving at the depot, and it was one that could but have had the effect of leading buyers to believe that all the material that was being sold was not necessarily in the warehouses at the Slough depot. The testimony of the witness Davies that the auctioneer made this statement is uncontradicted.

CONCLUSION.

It is submitted that the evidence shows that although it was possibly within the power of appellant to have discovered the quantity of packing actually on hand in the warehouse on the day of the sale, that, under the surrounding circumstances, it would have been impracticable for him to do so, and that as a matter of fact he did not know what quantity was on hand, or that the United States was unable to deliver the quantity that was sold to him, and that the findings of fact of the Court of Claims in the respects mentioned were based not upon the evidence but upon inferences that were unsupported by and that were contrary to the evidence.

It is further submitted that if the findings of fact set

out in Para. VII be amended to accord with the evidence, there will remain no basis of fact to support the conclusion that appellant actually had the knowledge which the Court of Claims in its decision has imputed to him.

Unless, therefore, the case be remanded to the Court of Claims and the Court of Claims be directed by this Court to amend its findings of fact in such way as to make them accord with the evidence, appellant will in effect be denied an appeal from a decision based on the evidence.

JENNINGS C. WISE,
Attorneys for Appellant.